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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT JOHN WHALEN,

Defendant and Appellant.

D055618

(Super. Ct. Nos. SCS223746,
SCS217535)

APPEAL from a judgment of the Superior Court of San Diego County, Dwayne K. Moring, Judge. Affirmed.

Robert Whalen appeals from a judgment convicting him of assault with a deadly weapon. He argues the trial court erred in (1) providing the jury a clarifying instruction on the definition of assault, and (2) admitting evidence of his prior commission of assault with a deadly weapon to prove knowledge. We reject his assertion of instructional error. The Attorney General concedes, and we agree, the other crimes evidence was not relevant to the issue of knowledge. However, because the other crimes evidence could

have been admitted on other grounds and the evidence of assault in the current case was strong, the error was not prejudicial. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On the afternoon of October 24, 2008, Whalen pulled a knife on a 13-year-old boy, Donato V., who was waiting at a bus stop. At trial, the incident was described by Donato, a woman waiting at the bus stop (Carol Torres), and a man driving by in a truck (Oscar Paredes). The defense theory was that Whalen committed the offense of brandishing a deadly weapon, but not assault with a deadly weapon.

The bus stop included a bench that was enclosed by a "see-through" metal grate enclosure.¹ Whalen was sitting on the bench, and Donato was behind the enclosure twirling glow sticks. Whalen turned around to Donato and told him that if he kept doing that he could be sent to jail for six months. Donato stopped twirling the glow sticks when Whalen spoke to him. After Whalen finished speaking, Donato resumed twirling the glow sticks. Whalen then stood up, walked around the enclosure, and stood about five feet from Donato. Whalen, who appeared to be angry, called Donato an "asshole." Donato, who now felt frightened, put his glow sticks inside his backpack. Whalen sat back down on the bench and took a knife from his backpack. Whalen then stood up and pointed the knife at Donato. According to Donato, when Whalen pointed the knife, Whalen remained inside the bus bench enclosure and the metal grate separated them. In

¹ It appears that the enclosure had three sides, and that there was a gap between the sides.

contrast, Torres and Paredes testified that when Whalen pointed the knife, he walked out of the enclosure and stood by Donato, and the metal grate was *not* between them.

Donato testified that Whalen was standing inside the enclosure pointing the knife at him. Donato could see the knife through a two-foot gap in the metal enclosure; Whalen was about three to five feet from him; the knife tip was about six inches to two feet from him; Whalen moved the knife from side to side and a bit forward; and he (Donato) jumped back away from the knife.

Torres was standing a few feet away from the enclosed bench area. She testified that when Whalen took out the knife, he walked around the enclosure and stood about five feet from Donato. Torres stated that Whalen extended his arm with the knife; "jabbed" the knife forward towards Donato about three times; and yelled at Donato to "get out of here." The tip of the knife was about two feet from Donato, and Donato jumped back to avoid the knife.

Paredes was in his truck waiting at a red light about 15 to 20 feet from the bus stop. Paredes testified that Whalen got up with a knife in his hand and went around the enclosure; Whalen was about three to five feet from Donato; the tip of the blade was within two feet of Donato; and Donato jumped back away from the knife.²

² According to Paredes, Whalen did not move the knife while pointing it at Donato.

After jumping back from the knife, Donato moved about 20 feet away.³ Donato testified he was frightened that Whalen would "do something" to him. According to Donato, Whalen yelled that if he got on the bus, Whalen would attack him. Torres testified that Whalen told Donato, "'[Y]ou get on my bus, I'll slit your throat.'" Whalen then sat back down on the bench. Torres and Paredes called 911, and Whalen was arrested.

Jury Verdict and Sentence

Whalen was charged with assault with a deadly weapon (count 1) and misdemeanor exhibiting a deadly weapon (count 2). The defense conceded he committed brandishing as alleged in count 2, but argued he did not commit assault. The jury found him guilty as charged. He received a two-year sentence for the assault with a deadly weapon conviction, and sentence on count 2 was stayed.⁴

DISCUSSION

I. Clarifying Instruction on Assault

Whalen argues the trial court provided an inappropriate clarifying instruction on the definition of assault after the jury informed the court it was deadlocked on the assault with a deadly weapon charge.

³ Torres testified Donato ran away, whereas Paredes testified he walked away. Donato testified he ran or "jogged" away; however, he acknowledged that at that preliminary hearing he stated he walked away.

⁴ Whalen also received an additional one-year sentence based on his conviction and probation revocation for an assault he committed in February 2008.

A. Background

Based on the language of CALCRIM No. 875, the jury was instructed on assault with a deadly weapon, including as follows:

"To prove that the defendant is guilty of [assault with a deadly weapon], the People must prove that:

1. The defendant *did an act* with a deadly weapon *that by its nature would directly and probably result in the application of force to a person*;
2. The defendant did that act willfully;
3. When the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone;
4. *When the defendant acted, he had the present ability to apply force* with a deadly weapon to a person. [¶]

"The People are not required to prove that the defendant actually touched someone. [¶] The People are not required to prove that the defendant actually intended to use force against someone when he acted." (Italics added.)

During deliberations, the jury informed the court that it was deadlocked on the assault with a deadly weapon count. When the court asked if there was a reasonable probability the jury could reach a verdict if it deliberated further, the jury foreperson responded, "No." The court asked if additional instruction or reading of testimony might be helpful. The jurors responded that it might help if they had further instruction concerning "what constitutes assault" and the meaning of an act that "[d]irectly [and] probably would result in application of force.'" After a discussion with the parties, the court agreed to instruct the jury, as requested by defense counsel, that an assault can be defined as an attempt to commit a battery. Over defense objection, the court also decided to instruct the jury with language from *People v. Chance* (2008) 44 Cal.4th 1164 (*Chance*) concerning the definition of assault.

Accordingly, the trial court provided the following clarifying instruction to the jury:

"1. An assault can be defined as an attempt to commit a battery. A battery is a harmful touching.

"2. An assault can also be defined in the following manner: A defendant's action *enabling him to inflict a present injury* is all that is required to commit the act of an assault. The People are not required to prove that the injury would necessarily occur as the very next step in the sequence of events, or without any delay. *When a defendant equips and positions himself* to carry out a physical attack or harmful touching, he has the 'present ability' required to commit the assault *if he is capable of inflicting injury on the given occasion*, even if some steps remain to be taken, and even if the victim or the surrounding circumstances thwart the infliction of injury.

"The 'present ability' element of the crime of assault is not negated by the circumstance that injury to the victim turns out to be impossible for reasons unrelated to the defendant's preparations." (Italics added.)

During the discussions with the court, defense counsel expressed a concern that instruction based on *Chance* would cause the jury to believe that the distance between the defendant and the victim was irrelevant. Defense counsel requested that the court include an additional statement that distance was a question for the jury to evaluate as a factual matter. The court declined counsel's request, reasoning the instruction did not remove the issue of distance from the jury's consideration.

After continuing its deliberations and receiving the clarifying instruction, the jury returned a guilty verdict on the assault charge. Defense counsel filed a new trial motion based on the clarifying instruction, which was denied.

B. *Governing Law*

To review Whalen's claim of instructional error, we summarize the law defining the crime of assault, including the California Supreme Court's interpretation of the elements of the offense.

Assault is statutorily defined as an "unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (Pen. Code, § 240.) Assault is a general intent crime, requiring that the defendant willfully commit an act that by its nature will probably and directly result in injury to another; i.e., a battery. (*People v. Williams* (2001) 26 Cal.4th 779, 782.) In *Williams*, the California Supreme Court explained that although assault is statutorily defined as an attempted battery, it is distinct from an ordinary attempt crime. (*Id.* at p. 786.) The act constituting an ordinary criminal attempt need not be the last proximate or ultimate step towards commission of the substantive crime. (*Ibid.*) In contrast, an assault requires an act that immediately precedes a battery; i.e., an assault occurs whenever the next movement would, at least to all appearances, complete the battery. (*Ibid.*) Because the act for ordinary criminal attempt may be more remote than the act required for assault, criminal attempt requires a specific intent to commit the crime. (*Ibid.*) Assault, on the other hand, does not require a specific intent to injure because the assaultive act, by its nature, subsumes this intent. (*Ibid.*; see also *People v. Colantuono* (1994) 7 Cal.4th 206, 214-215 ["Although the defendant must intentionally engage in conduct that will likely produce injurious consequences, the prosecution need not prove a specific intent to inflict a particular harm. . . . Because the offensive or dangerous character of the defendant's conduct, by

virtue of its nature, contemplates such injury, a general criminal intent to commit the act suffices to establish the requisite mental state"].)

In *Chance*, *supra*, 44 Cal.4th 1164, the California Supreme Court clarified the definition of assault set forth in *Williams*. In *Chance*, the defendant was pointing a loaded gun while hiding from an officer behind a trailer, and when the officer approached the defendant from behind and ordered him to drop his weapon, the defendant lowered his gun and continued to flee. (*Chance*, *supra*, 44 Cal.4th at pp. 1168-1169.)

Challenging his assault with a firearm conviction, the defendant argued the facts did not show the assault element of "present ability" to commit a battery because he would have had to turn, point the gun at the officer, and chamber a round before he could shoot at the officer. (*Id.* at p. 1171.) To support his argument, the defendant cited the language in *Williams* requiring that the act immediately precede a battery and that the next movement appear to complete the battery. (*Chance*, at p. 1171.) Rejecting the defendant's contention, the *Chance* court explained that the *Williams* analysis was based on an evaluation of the intent (not the present ability) element, and it was designed to distinguish assault (which requires merely general intent because the act must be immediately antecedent to a battery) from ordinary criminal attempt (which requires specific intent because the act may be more remotely connected to the attempted crime). (*Chance*, at pp. 1167-1168, 1175.)

The *Chance* court clarified that in the assault context, immediately does not mean instantaneously; rather, it simply means the defendant must have the ability to inflict injury on the present occasion. (*Chance*, *supra*, 44 Cal.4th at pp. 1168, 1171.) The

defendant's action enabling him to inflict a present injury constitutes the actus reus of assault; there is no requirement that the injury would necessarily occur as the very next step in the sequence of events, or without any delay. (*Id.* at p. 1172.) Assault does not require a direct attempt at violence, but occurs whenever there is "'any indirect preparation towards it, . . . such as drawing a sword or bayonet, or even laying one's hand upon his sword . . .'" (*Ibid.*) Thus, when a defendant "equips and positions himself to carry out a battery, he has the 'present ability'. . . if he is capable of inflicting injury on the given occasion, even if some steps remain to be taken, and even if the victim or the surrounding circumstances thwart the infliction of injury." (*Ibid.*) "Although temporal and spatial considerations are relevant to a defendant's 'present ability'. . . it is the ability to inflict injury on the present occasion that is determinative, not whether injury will necessarily be the instantaneous result of the defendant's conduct." (*Id.* at p. 1171.) In short, the present ability element is satisfied when the defendant has attained the means and location to strike immediately. (*Id.* at pp. 1168, 1175-1176.)

C. Analysis

Whalen asserts the clarifying instruction was improper because *Chance* concerned the present ability element, and the standard formulated in *Chance* was not responsive to the jury's specific question or relevant to the facts of his case. We disagree.

In *People v. Colantuono*, *supra*, 7 Cal.4th at page 222, the California Supreme Court admonished trial courts not to "embellish on the standard jury instructions for assault and assault with a deadly weapon unless compelled by the peculiar facts of the case." The facts of this case support the trial court's decision to instruct on the principles

set forth in *Chance* in response to the jury's statement that additional information on the meaning of assault might help it reach a verdict. (See *People v. Solis* (2001) 90 Cal.App.4th 1002, 1015 [court has discretion to determine what additional explanations should be given in response to deliberating jury's request for information]; *People v. Sheldon* (1989) 48 Cal.3d 935, 958-960 [court has discretion to determine whether deadlock might be broken by rereading of instructions].)

The *Chance* court, in the context of the present ability element, evaluated the requirement that there be an immediate connection between the assault and the battery, and concluded that immediacy did not mean that the next step after the defendant's act must instantaneously result in a battery. Here, the jurors' question to the court reflects that they wanted clarification on the meaning of assault, including the requirement that the act would directly and probably result in the application of force. According to Donato's description of the incident, he and Whalen were separated by the metal enclosure at the time Whalen pointed the knife. Based on this testimony, unless Whalen reached through the two-foot gap in the enclosure, he would have needed to move around the enclosure to stab Donato. According to Torres and Paredes, Whalen moved outside the enclosure, but he was standing three to five feet away from Donato when he pointed the knife at him. Under either version of the facts, Whalen might not have been able to *instantaneously* commit a battery.

Given these facts, when evaluating whether Whalen's act by its nature would directly and probably result in force, the jury could have questioned whether the act must be of such a nature that it would instantaneously result in the application of force at the

next step. The *Chance* court's analysis of this question in the context of the element of the defendant's present ability to apply force, applies equally in the context of the element addressing the nature of the act.

The trial court's clarifying instruction told the jury that the defendant need only enable himself to inflict a present injury; there was no requirement that the injury would necessarily occur at the very next step or without any delay; and the defendant need only equip and position himself to carry out a harmful touching so that he is capable of inflicting injury on the given occasion. The instruction properly informed the jury that the act need not be such that it would likely instantaneously result in the application of force, as long as it would likely result in the application of force on the same occasion.

Noting that a key issue at trial turned on the distance between Whalen and the victim and that the jury was deadlocked on the assault charge before the court gave the clarifying instruction, Whalen argues the instruction based on *Chance* gave the jury "a simple but improper way to ignore [the] testimony . . . showing . . . Whalen may never have gotten close enough to effect an assault." He posits that the clarifying instruction "implied that distance was in fact not significant to the question of whether the act would directly and probably result in force or whether the defendant should have known the act would result in the application of force." Similarly, he argues the clarifying instruction created "the erroneous impression that merely drawing the knife 'would directly and probably result in the application of force.'"

When determining whether an instruction had an improper effect on jurors, we inquire whether there is a reasonable likelihood the jury understood the instruction as

asserted by the defendant. (*People v. Cross* (2008) 45 Cal.4th 58, 67-68.) There is no reasonable likelihood the jurors interpreted the clarifying instruction to mean they could ignore the testimony calling into question Whalen's assault culpability based on his distance from the victim. The instruction stated that if the defendant had equipped and positioned himself so he was able to inflict injury on that particular occasion, he had the present ability to apply force even if he needed to take additional steps to commit the battery. There is nothing in the clarifying instruction that suggested to the jurors that they did not need to determine whether Whalen was close enough to the victim to be able to commit a battery on that occasion so as to prove his guilt of assault. To the contrary, the instruction set forth the requirement that the defendant must have "*position[ed] himself*" so that he could inflict injury on the "*given occasion*." (Italics added.) Consistent with this, during closing arguments (which occurred before the clarifying instruction), the prosecutor and defense counsel presented their differing views on how the distance impacted Whalen's culpability.⁵ Reasonable jurors would have understood that the issue of how Whalen positioned himself included a consideration of how far he was from the victim when pointing the knife.

⁵ The prosecutor told the jurors that the decision whether Whalen committed assault or mere brandishing was a "judgment call" for them to make, based on whether Whalen was close enough to Donato. The prosecutor argued that Whalen committed assault because he had the present ability to make contact with Donato "right then and there" because "[t]hey were feet apart, face to face with the defendant [waving the] knife around. [¶] It was so close that Donato . . . had to jump back." Defense counsel conceded that Whalen committed brandishing, but argued the prosecution did not prove the assault element of an act that would directly and probably lead to the application of force, citing the testimony indicating they were three to five feet apart, the metal grate separated them, and Whalen did not lunge at or chase Donato.

Whalen also asserts the clarifying instruction was presented to the jury as if it was a "stand alone" definition of assault, whereas it did not in fact convey all the elements of assault. Again, there is no reasonable likelihood the jury interpreted the instruction in this fashion. The jury was instructed on all the elements of assault in the language of CALCRIM No. 875. The court's clarifying instruction, provided in response to the jury's request for further instruction on assault, did not tell the jury to ignore the previous instructions. We assume the jurors are intelligent persons and capable of understanding and correlating all the instructions. (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.) There is no reasonable likelihood the jury ignored the descriptions of the assault elements set forth in the original instruction provided to them.

There was no instructional error.

II. *Other Crimes Evidence*

Whalen asserts the trial court erred in admitting evidence of his prior offense of assault with a knife to show knowledge.

A. *Background*

In pretrial motions, over defense objection, the trial court granted the prosecution's request to admit evidence of Whalen's prior commission of assault with a deadly weapon. The trial court ruled the evidence was admissible on the issue of Whalen's knowledge.⁶

At trial, Luis Tercero, the manager of a store, testified that on February 22, 2008, Whalen was knocking items off the shelves at the store. As Tercero escorted Whalen out

⁶ The trial court rejected the prosecutor's request to admit the evidence to show common scheme or plan.

of the store and told him to leave, Whalen cursed at Tercero and stated he was going to cut off Tercero's head. Tercero called 911 and, to make sure Whalen left the premises, followed as Whalen walked towards an adjacent gas station. When Whalen reached the gas station parking lot, he pulled a knife from his jacket. Whalen was about 12 feet from Tercero. Whalen waved the knife at Tercero; yelled at Tercero to walk over to him; stated he was going to cut Tercero's throat; and walked about six feet closer to Tercero. Tercero told Whalen he needed to leave because the police were coming; he did not know who he was dealing with because Tercero had a black belt in karate; and he should come over to Tercero. Whalen turned and walked again towards the gas station, and Tercero went back to his store until the police arrived and arrested Whalen.

The jury was instructed that if it found that Whalen committed assault with a deadly weapon against Tercero, it could consider the evidence for the limited purpose of deciding whether, when Whalen acted in the current offense, he was aware of facts that would lead a reasonable person to realize his act by its nature would directly and probably result in the application of force. The jury was admonished not to conclude from the uncharged offense that Whalen had a bad character or was disposed to commit a crime.

B. *Analysis*

Evidence of offenses committed by the defendant that are not charged in the current case is generally inadmissible for purposes of showing the defendant's bad character or propensity to commit crimes. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 203.) However, other crimes evidence is admissible when relevant to prove some fact

other than criminal disposition, such as intent, knowledge, or absence of mistake or accident. (*Ibid.*)

To be relevant on intent or knowledge, the conduct during the past and current crimes must be sufficiently similar to support a rational inference that the defendant harbored the same intent or knowledge in each instance. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402; *People v. Torres* (1950) 98 Cal.App.2d 189, 192.) The recurrence of a similar result tends increasingly with each instance to negate accident, good faith, or other innocent mental state. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 402; *People v. Steele* (2002) 27 Cal.4th 1230, 1244.) However, because of the prejudice inherent in other crimes evidence, the evidence must have substantial probative value, and the probative value must not be outweighed by the probability of undue prejudice, confusing the issues, or misleading the jury. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 404.) We review the trial court's rulings for abuse of discretion. (*People v. Whisenhunt, supra*, 44 Cal.4th at pp. 203, 205.)

The Attorney General concedes, and we agree, that the trial court erroneously admitted the other crimes evidence on the issue of knowledge. The knowledge element requires that the defendant actually know the facts establishing that a reasonable person would realize that the act by its nature will directly and probably result in physical force being applied. (*People v. Williams, supra*, 26 Cal.4th at p. 787-788.) However, the defendant need not be subjectively aware of the risk that a battery might occur; all that is required is the defendant's knowledge of the facts existing at the time of his conduct. (*Id.* at p. 788.) Whalen's knowledge of the particular facts that existed at the time of the prior

offense does not shed any light on whether he had knowledge of the facts that existed during the current offense. The knowledge element for assault is not akin to the knowledge required for an offense such as narcotics possession or sales, where the defendant's past drug-related offense is relevant to show knowledge of the substance's character in the current offense. (See, e.g., *People v. Ellers* (1980) 108 Cal.App.3d 943, 953.) Here, Whalen's knowledge of what was occurring during the prior knife incident was not relevant to show Whalen's knowledge of what was occurring during the current incident.

However, we conclude there is no reasonable probability the error affected the outcome. (*People v. Welch* (1999) 20 Cal.4th 701, 749-750; *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1018-1019.) We agree with the Attorney General that the other crimes evidence was admissible to show the defendant acted with the intent required for assault. Although assault does not require a specific intent, it requires that the defendant acted willfully, i.e., intentionally or on purpose. (*People v. Colantuono, supra*, 7 Cal.4th at p. 214.) A jury could reasonably infer that Whalen's prior commission of an assault with a knife would tend to show that he did not inadvertently retrieve and point the knife, but rather that he acted intentionally. Because the other crimes evidence was admissible to show intentional conduct, this is not a case where the trial court's error allowed the jury to hear entirely inadmissible evidence of the defendant's prior misconduct. In effect, the error primarily concerned improper instruction on the issue for which the evidence was admissible. There is no reasonable probability the jury would have reached a different verdict had it not received the erroneous knowledge instruction. There were no facts

suggesting Whalen did not have knowledge of the facts surrounding the incident so as to make the knowledge issue a pivotal factor affecting the jury's verdict.

In any event, even if the other crimes evidence should have been entirely excluded, there is no reasonable probability that absent the evidence the jury would have rejected the assault charge and convicted Whalen merely of brandishing. If Whalen exhibited the knife in a rude, angry, or threatening manner, but his act would not likely lead to a touching or he had no present ability to touch the victim, his crime would be brandishing, not assault. (See Pen. Code, § 417, subd. (a)(1) [brandishing offense]; *People v. Hall* (2000) 83 Cal.App.4th 1084, 1091-1092 [brandishing is complete upon exhibition of weapon in rude, angry, or threatening manner].) The record contains strong evidence of the elements of assault.

The evidence showed that Whalen was angry at Donato and, after calling Donato an "asshole," he withdrew a knife from his backpack and pointed it at Donato. A key disputed issue was whether Whalen was close enough to Donato to support an assault verdict. The witness testimony indicated that when Whalen pointed the knife, Donato was from three to five feet away from him. The close proximity between Whalen and Donato creates a compelling inference that Whalen could have moved and placed himself within striking distance of Donato.

A finding that Whalen had positioned himself to be able to readily stab Donato creates a compelling inference that he committed an act that would directly and probably lead to a battery, and that he had the present ability to commit a battery. Once the jury made these findings, the assault offense was complete, and the fact that Whalen did not

pursue Donato once Donato ran away would not relieve him of assault culpability. (See *People v. McMakin* (1857) 8 Cal. 547, 547-549 [assault committed once defendant put himself in position to use weapon, even though defendant did not pursue victim after victim complied with defendant's demand to leave]; *People v. McCoy* (1944) 25 Cal.2d 177, 192-193.) The assaultive nature of Whalen's act was also buttressed by his threats to attack Donato if Donato got on the same bus. (See *People v. McMakin, supra*, 8 Cal. at p. 549 [defendant's statements of intent to use weapon supportive of assault culpability]; *People v. Colantuono, supra*, 7 Cal.4th at pp. 218-219, fn. 10 [even though intent to injure is not element of assault, defendant may present evidence of lack of intent to injure].)

Although the jury was at one point deadlocked on the assault charge, after receiving clarification that the connection between the assault and the battery need not be instantaneous, the jury returned a guilty verdict on assault. Given the strength of the evidence showing Whalen committed assault with a deadly weapon, there is no reasonable probability the jury would have rejected an assault finding absent the prior offense evidence.

DISPOSITION

The judgment is affirmed.

HALLER, Acting P. J.

WE CONCUR:

McDONALD, J.

O'ROURKE, J.